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Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

BORDEN, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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44 pp

QUESTION PRESENTED

Whether the National Labor Relations Board discharges its duty to conduct secret, union representation elections where voters are required to ensure the secrecy of their ballots through their own efforts.

LIST OF PARTIES

Borden is privately held and controlled through intermediaries by Kohlberg, Kravis, Roberts & Co., a limited partnership. The publicly traded affiliates controlled by Kohlberg, Kravis are Fred Meyer, Inc.; Layne Christensen, Inc.; Union Texas Petroleum Holdings, Inc.; World Color Press, Inc.; Safeway, Inc.; Owens-Illinois, Inc.; Duracell International, Inc.; K-III Communications Corporation; American Re Corporation; and Flagstar Companies, Inc. Borden has no non-wholly owned subsidiaries.

The caption contains the names of all parties to the underlying action before the United States Court of Appeals for the Fifth Circuit.

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PETITION FOR WRIT OF CERTIORARI

Borden, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Fifth Circuit is reprinted in the Appendix at App. 1. The decision and order of the National Labor Relations Board is reported at 318 N.L.R.B. No. 112 (1995), and is reprinted in the Appendix at App. 7. The unreported certification of representative by the Board is reprinted in the Appendix at App. 18. The unreported decision of the Hearing Officer is reprinted in the Appendix at App. 20.

JURISDICTION

On August 1, 1996, the Fifth Circuit entered judgment in this matter. On August 27, 1996, the Court denied Borden's petition for rehearing and suggestion for rehearing *en banc*. The Supreme Court has jurisdiction to review this opinion pursuant to 28 U.S.C. § 1254(1).

STATUTE AND REGULATION INVOLVED

Section 9(c)(1) of the National Labor Relations Act is involved in this matter. In relevant part, the section provides:

> If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

29 U.S.C. § 159(c)(1).

Section 102.69 of Title 29 of the Code of Federal Regulations also is involved in this matter. In relevant part, the section provides "[a]ll elections shall be by secret ballot." 29 C.F.R. § 102.69.

STATEMENT OF THE CASE

The issue in this case is whether the Board discharged its duty under the Act to conduct secret, union representation elections where voters were required to ensure the secrecy of their ballots through their own efforts.

An election was conducted among certain Borden employees to determine whether they desired to be represented for purposes of collective bargaining by the United Food and Commercial Workers International Union, Local 540. On the morning of the election, the Board agent responsible for conducting the election arrived at the facility without the standard portable voting booth. Nevertheless, the Board agent decided to proceed with the election, and a makeshift voting booth was hastily constructed. The makeshift booth was constructed from a piece of cardboard, a few chairs and a table. The cardboard was placed upright, parallel to a wall in the room, on the chairs. The table was placed about one foot inside the cardboard partition. Employees could walk

between the table and the partition to the interior of the booth.

The observer's table was approximately eight feet from the makeshift cardboard booth, in a location that permitted the people at the table – including a Board observer, a Borden observer, a Union observer, and employees waiting to vote – to see into the voting booth.

Employees who voted testified after the election that they noticed other people standing and sitting behind them while they were voting, that an employee waiting to vote could see a person's entire left side of their body and face at the table in the voting booth while they were voting, that the employees standing behind the persons voting could see into the voting booth, that they expected more privacy, and that they felt uncomfortable voting in such conditions.

The Union won the election by two votes. Thereafter, Borden filed a timely objection to the conduct of the election, contending that the election was not secret as required by the Act, and a hearing was held. Based on the construction of the voting booth, the configuration of the room in which the voting occurred, and the lack of testimony that any individual saw a ballot being marked, the Hearing Officer recommended that Borden's objections be overruled. In support of her recommendation, the Hearing Officer stated that "[t]he Board has no requirement that the voting booth be completely enclosed."

Subsequently, the Board adopted the Hearing Officer's findings and recommendations without comment, and certified the Union as the exclusive collective bargaining representative of the employees in the unit that

voted. Following the Board's decision, Borden refused to bargain with the Union on the basis that the Board's certification of the Union was invalid and improper because of the defects in the conduct of the election.

The Board issued a complaint alleging that Borden engaged in unfair labor practices by refusing to bargain, in violation of Sections 8(a)(1) and (5) of the Act. 29 U.S.C. §§ 158(a)(1), (5). Borden answered that it had declined to recognize and bargain with the Union for the reason that the certification of the Union in the underlying representation case was improper and invalid, because the Board failed to assure a secret ballot election as required under the Act and failed to maintain the "laboratory conditions" required of elections under the Act. The Board ultimately determined that Borden violated Sections 8(a)(1) and (5) of the Act by refusing to bargain with the Union. Thereafter, Borden still refused to bargain with the Union on the basis that the Board's certification of the Union was invalid and improper.

Consequently, the Board filed an application with the Fifth Circuit to enforce its order, invoking the jurisdiction of the Court under Section 10(e) of the Act. 29 U.S.C. § 160(e). Borden submitted its answer to the application, asserting that the certification of the Union was improper and invalid because the Board failed to assure the secrecy of the election.

On August 1, 1996, the Fifth Circuit enforced the Board's application for enforcement, finding that the Board did not abuse its discretion because "[t]he recommendations of the hearing officer, adopted by the Board, were based on consideration of the physical layout of the

voting booth, the location of the observer table, and the absence of testimony that anyone was able to see how any voter marked his ballot."

REASONS FOR GRANTING THE WRIT

The Supreme Court should grant Borden's petition for writ of certiorari because the Fifth Circuit's decision conflicts with the Act and *Brennan v. Local 3489, United Steelworkers of America, AFL-CIO*, 520 F.2d 516 (7th Cir. 1975), *aff'd*, 429 U.S. 305 (1977). Further, it presents a question of importance concerning industrial democracy. Finally, the Fifth Circuit's decision is erroneous. The Hearing Officer, the Board, and the Fifth Circuit erroneously failed to consider whether the election " 'not only provide[d] privacy but . . . also demonstrate[d] the appearance of providing privacy,' " *Bekins Moving & Storage Co.*, 279 N.L.R.B. 823, 824 (1986) (citation omitted); and erroneously relied, in part, on the fact that the voters could ensure the secrecy of their ballots through their own efforts.

I. The Fifth Circuit's Decision Conflicts with the National Labor Relations Act and a Decision of the Seventh Circuit.

The Act and Regulations under the Act require *the Board* to conduct representation elections by secret ballot. 29 U.S.C. § 159(c)(1); 29 C.F.R. § 102.69; *see also* National Labor Relations Board, *Casehandling Manual (Part Two) Representation Proceedings* (1989), at § 11300 ("The responsibility for the proper conduct of the election is the

Regional Director's, acting through the assigned Board agent."). The Board has expounded its obligation, stating:

> In election proceedings, *it is the Board's function* to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. *It is our duty to establish these conditions; it is also our duty to determine whether they have been fulfilled.* When, in the rare extreme case, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.

General Shoe Corp., 77 N.L.R.B. 124 (1948) (emphasis added).

The Board cannot abdicate its responsibility to conduct secret elections by requiring voters to ensure the secrecy of their ballots through their own efforts. In *Brennan v. Local 3489, United Steelworkers of America, AFL-CIO*, 520 F.2d 516 (7th Cir. 1975), *aff'd*, 429 U.S. 305 (1977), the United States Court of Appeals for the Seventh Circuit stated:

> [The] argument that every voter had an opportunity to make his ballot secret by going to an unpopulated area within the large room or to one of the small rooms or by guarding his vote from observation must fail. . . . In many cases, requiring a union member to make a great show of securing his secrecy may be tantamount to indicating his vote. *The Act requires a mandatory secret ballot, not one permitting a voter to mark his*

> *ballot in secret with the danger of identification implicit in securing that secrecy.*

Id. at 522 (emphasis added).

In this case, the Fifth Circuit relied, in part, on the fact that voters could ensure the secrecy of their ballots by walking behind the table in the voting booth. In other words, the Court decided that the Board did not abuse its discretion by approving an election in which the voters were required to ensure the secrecy of their ballots. The Fifth Circuit's decision conflicts with the Act and the Seventh Circuit's decision in *Brennan*. The Act requires *the Board* to ensure the secrecy of a representation election. As the Seventh Circuit held, the Act allows for no dereliction of that duty. Yet, the Fifth Circuit's decision allows the Board to abdicate its responsibility by requiring the employees to ensure the secrecy of their ballots through their own efforts. To resolve the conflict between the Fifth Circuit's decision and the language of the Act and the Seventh Circuit's decision in *Brennan*, and to ensure a consistent approach to representation elections around the country, the Court should grant Borden's petition.

II. The Case Presents an Important Question Concerning Industrial Democracy.

Secret elections are the cornerstone of industrial democracy. The Act, the Regulations under the Act, and case law highlight the importance of secret elections. As mentioned, the Act and Regulations require the Board to conduct representation elections by secret ballot. 29 U.S.C. § 159(c)(1); 29 C.F.R. § 102.69. Likewise, the Board

has recognized that it must "closely guard the integrity of its elections so that employees may exercise the freedom of choice contemplated by the Act and thereby have a full opportunity to enjoy its other benefits." *Oak Manufacturing Co.*, 141 N.L.R.B. 1323, 1324 (1963).

This case presents a question which strikes at the very foundation of industrial democracy – secret elections. If the Board is allowed to conduct future elections in the same manner as this election, the effects on industrial democracy will be immediate, far-reaching, and irreversible. One improper election is too many in a democratic system. The employees affected by an improper election are forced to live with the results for at least one year. During that year, a Union which may not enjoy majority support will determine the terms and conditions of employment for those employees. Such a situation is absolutely unacceptable. The Court should prevent any future injustice, stop the Board from future abdication of its responsibility, and protect the principles of industrial democracy. The Court should grant Borden's petition.

III. The Fifth Circuit's Decision Is Erroneous.

The Hearing Officer, the Board, and the Fifth Circuit failed to consider the totality of the circumstances in which this election was conducted and failed to determine whether the conditions " 'not only provide[d] privacy but . . . also demonstrate[d] the appearance of providing privacy.' " *Bekins Moving & Storage Co.*, 279 N.L.R.B. 823, 824 (1986) (quoting National Labor Relations Board, *Casehandling Manual (Part Two) Representation*

Proceedings (1989), at § 11304.3). There is no dispute that the makeshift cardboard voting booth was completely open at the back, that the observer's table was only eight feet or so from the voting booth in a location where the persons at the table could see the employees while they were voting, that other employees were standing around and behind the voting booth while employees were voting, that employees standing behind persons voting could see into the voting booth, and that employees expected more privacy and were uncomfortable voting under such conditions.

As the Fifth Circuit indicated, the Hearing Officer found that voters could have walked behind the table to ensure the secrecy of their ballots. The Union also argued at the hearing that employees could have put their stomach flush against the table and placed their ballot against the cardboard forming the side wall while they were marking it, in order to be able to mark their ballot in secrecy.

Even assuming that employees could have moved behind the table or used their bodies as a shield in an attempt to ensure the secrecy of their ballots, an election under such circumstances is insufficient to meet the privacy requirements that must be afforded to employees. There is no evidence that any employees actually undertook such extraordinary measures, or that all of the employees who voted would have been physically capable of doing so. Moreover, requiring employees to make such an obvious show of securing their privacy creates the danger that others in the room will make inferences about how the employee is voting. *Brennan*, 520 F.2d at 522. It does not matter whether the inferences are correct.

The significant concern is that the employee would be inhibited by the possibility that others would draw such inferences. In such circumstances, the election could not determine the "uninhibited desires of the employees" or provide the "ideal atmosphere in which a free choice may be made by employees." *Home Town Foods, Inc. v. N.L.R.B.*, 416 F.2d 392, 396 (5th Cir. 1969). Further, employee concerns about their privacy could have affected the outcome of the election, which was decided by only two votes.

The Hearing Officer, Board, and Fifth Circuit failed to consider whether Borden's employees were allowed to vote in conditions which provided privacy and demonstrated the appearance of providing privacy. Therefore, the Board abused its discretion by approving the Hearing Officer's recommendation, and the Court of Appeals erred by enforcing the Board's decision.

CONCLUSION

This case presents a question concerning the bedrock of industrial democracy – secret elections. That bedrock is eroded each time the Board conducts an election which fails to comply with the high standards of the Act. This case presents an opportunity for the Court to stop the erosion and to announce an inviolable standard, consistent with the Act, to guide future elections. For these

reasons, Borden requests that the Court grants its petition for writ of certiorari.

Respectfully submitted,

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Counsel of Record
KEITH KING

Attorneys for Petitioner

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60079
Summary Calendar

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

VERSUS

BORDEN, INC.,

Respondent.

Application for Enforcement of an Order of
the National Labor Relations Board
(16-CA-17467)

(Filed Aug. 01, 1996)

Before SMITH, DUHÉ, and BARKSDALE, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

The National Labor Relations Board (the "Board") seeks enforcement of its order requiring that Borden, Inc., recognize the United Food and Commercial Workers International Union as the exclusive bargaining agent for

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Borden's production, maintenance, vault, and warehouse employees ("the unit") at Borden's Sulphur Springs, Texas, facility. We grant the application and enforce the order.

I.

On March 8, 1995 the Board conducted an election at the facility to determine whether the unit wished to be represented by the union for collective bargaining purposes. On the morning of the election, the Board agent responsible for supervising the election arrived at the polling area without the standard portable voting booth. Rather than postponing the election, the agent had Borden construct a makeshift voting booth.

Borden constructed the booth by placing a piece of cardboard on a chair and then placing the chair against a wall near a corner of the room. This formed a three-sided voting booth: The booth was enclosed on two sides by the walls of the room, enclosed on the third side by the cardboard partition, and open on the fourth side. A table was placed inside the booth to allow voters to mark their ballots.

The room also contained an observers' table. Observers from the Board, Borden, and the union sat at the table, and voters awaiting their turn at the ballot box stood beside the table. The observers' table was located at least eight feet behind the open side of the voting booth and six feet from the adjacent wall. Those seated at the table thus were able to see into the booth at a forty-five-degree angle, making the interior of the booth partially visible to observers and those waiting to vote.

The union won the election by two votes. Borden challenged the election, claiming that it was not conducted with the necessary secrecy because the voting booth was not completely enclosed. The Board ordered a hearing to resolve the challenge.

The hearing officer found that the election was satisfactory. The officer determined that the table inside the voting booth did not occupy the entire booth and that voters were able to walk around the table to a completely concealed part of the booth to ensure privacy when marking their ballots.[1] Furthermore, the officer noted that none of Borden's witnesses had testified that they observed how any employee had voted.[2] One of Borden's witnesses testified that he could see only the arms and back of a person standing in the voting booth, while a second witness testified that he could see the whole person in the booth but did not believe that he could see the ballot. Based on this evidence and the physical layout of the voting area, the officer recommended that the Board reject Borden's challenge.

The Board adopted the hearing officer's findings and certified the union as the exclusive bargaining representative. To obtain judicial review, Borden refused to recognize the union. The union then filed a complaint with the

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[1] This was a hotly disputed issue at the hearing. Borden contended that the table took up the entire voting booth and that voters therefore were unable to vote in private. Borden does not challenge this finding on appeal.

[2] In fact, three of Borden's witnesses – one an observer and the other two voters – testified that they could not see how any voter had marked his ballot.

Board, which ordered Borden to extend recognition. The Board filed this application for enforcement of its order.

II.

Borden argues that the Board erred by upholding the election despite the absence of a completely enclosed voting booth. We review the Board's decisions pertaining to representation elections only for abuse of discretion.[3]

In representation elections, the board must take "a secret ballot of the employees." 29 U.S.C. § 159(e)(1).[4] The Board did not abuse its discretion in finding that the election satisfied this requirement. The recommendations of the hearing officer, adopted by the Board, were based

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[3] Congress has given the Board wide discretion in the conduct and supervision of representation elections, and the Board's decision warrants considerable respect from reviewing courts. Our review is limited to determining whether the Board has reasonably exercised its discretion, and if the Board's decision is reasonable and based upon substantial evidence in the record considered as a whole, our inquiry is at an end. Representation elections are not lightly set aside.

NLRB v. Hood Furniture Mfg. Co., 941 F.2d 325, 328 (5th Cir. 1991) (citations omitted); see also *NLRB v. Heavy Lift Serv., Inc.*, 607 F.2d 1121, 1123, (5th Cir. 1979) ("[T]he Board's long experience in representation matters requires us to give special deference to its decisions regarding the effect of challenged conduct on the results of an election."), *cert. denied*, 449 U.S. 822 (1980); *NLRB v. W.R. Grace & Co.*, 571 F.2d 279, 282 (5th Cir. 1978) ("[T]he Board has been vested with wide discretion in representation matters, and its decision warrants special respect by reviewing courts.").

[4] The Board's own regulations also require that "[a]ll elections shall be by secret ballot." 29 C.F.R. § 102.69(a).

on consideration of the physical layout of the voting booth, the location of the observer table, and the absence of testimony that anyone was able to see how any voter marked his ballot.

Borden calls our attention to *Brennan v. Local 3489, United Steelworkers of Am.*, 520 F.2d 516 (7th Cir. 1975), *aff'd on other grounds*, 429 U.S. 305 (1977), in which the court found that a union election failed to meet the secret ballot requirement. *Local 3489* is easily distinguished on its facts,[5] however:

> A small table for marking ballots was placed three feet in front of an elevated officers' bench. Two members of the Election Committee were present throughout the 6:00 a.m. to 6:00 p.m. election. Most of the voting occurred during the last two hours of the day, when the voters were "jammed together * * * elbow to elbow." Up to 50 voters were in the room at one time. Many voters marked their ballots at the aforesaid table and could see each other's ballots as they were marked. Others marked their ballots against the walls, and their markings could also be observed by voters several feet away. No one was seen carrying a ballot to the back of the hall to vote, and some members deliberately

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[5] Although *Local 3489* involved an election for union officers rather than a representation election, it is not distinguishable on that basis. Both types of elections must be conducted by "secret ballots," though the secret ballot requirements are located in different statutes. *Compare* 29 U.S.C. § 159(e)(1) (requiring the board to take "a secret ballot of the employees") *with id.* at § 481(b) (requiring that unions elect officers "by secret ballot"). There is no basis for reading the two secret ballot requirements differently.

> "flaunted their votes." There was no encouragement of any members to take steps to prevent others from seeing their ballots.

Id. at 521-22. The voters in the Borden election unquestionably enjoyed far greater privacy than did voters in the *Local 3489* election. Furthermore, while some voters in the *Local 3489* election "deliberately flaunted their votes," there was no testimony that anyone had seen how a single voter marked his ballot in the Borden election.

The order of the National Labor Relations Board is ENFORCED.

NOTICE: This opinion is subject to formal revision before publication in the Board volumes of NLRB decisions. Readers are requested to notify the Executive Secretary. National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Borden, Inc. *and* United Food and Commercial Workers International Union, AFL-CIO, CLC, Local 540. Case 16-CA-17467

September 12, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

Upon a charge filed on July 3, 1995, the General Counsel of the National Labor Relations Board issued a complaint on July 19, 1995, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain and to furnish necessary and relevant information following the Union's certification in Case 16-RC-9768. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On August 14, 1995, the General Counsel filed a Motion for Summary Judgment. On August 17, 1995, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On August 31, 1995, the Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer and response to the Notice to Show Cause, the Respondent admits its refusal to bargain and to furnish information, but attacks the validity of the certification on the basis of its objections to conduct alleged to have affected the results of the election in the representation proceeding. In addition, the Respondent asserts several defenses with respect to the Union's information request on the grounds of burdensomeness, overbreadth, vagueness, relevance, confidentiality, and harassment.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, and as the Respondent admits its refusal to bargain with the Union, we grant the Motion for Summary Judgment with respect to those allegations of the complaint relating to the Respondent's refusal to honor the Union's certification and to bargain with the Union.

However, we find that there are material issues of fact with respect to the allegations in the complaint relating to the Respondent's refusal to provide information requested by the Union.[1] In its answer and response to

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[1] The complaint alleges that by letter dated June 16, 1995, the Union requested the following information from the Respondent:

1. Individual rates of pay and classification for each bargaining unit employee;

2. Copies of Company rules, regulations and attendance policies applicable to bargaining unit employees;

3. Copy of job and crewing standards;

4. Copy of job and evaluation systems;

5. Copy of employee insurance plan and cents per hour cost to the Company and/or employees. If the plan provides for family coverage and single coverage, the appropriate cents per hour cost for each. A breakdown of how many employees have family coverage and single coverage;

6. Copy of employee retirement plan, profit sharing, 401k plan and the cents per hour cost to the Company and/or employee for each plan;

7. A list of paid Holidays and the [n]umber of hours employees are compensated for each Holiday;

8. A total breakdown of all job classifications and job descriptions, along with the rates of pay for each job;

9. Starting rates of pay for new hires and the progression schedule for wage increases;

10. A total description on the method of resolving employee grievances and/or complaints;

11. A total description on the method of earning paid vacation time, up to the maximum;

the Notice to Show Cause, the Respondent contends that it does not keep some of the information requested by the

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12. A total description of any formula or methods used to prorate paid vacation time;

13. A total description of Company policies regarding any unpaid leave of absence from work;

14. Total annual expense for FICA and unemployment compensation for 1994 and year to date for 1995;

15. Total number of overtime hours worked by employees in 1994 and year to date in 1995;

16. Total expense for all overtime hours paid to employees in 1994 and year to date in 1995;

17. Most current list of names, addresses and phone numbers of all bargaining unit employees;

18. A total breakdown of sex and age of each bargaining unit employee;

19. The number of paid relief periods issued to employees in a normal scheduled worked day and the duration of such relief period;

20. The method of the distribution of overtime opportunities within a work group or department when the entire group is not required to work the overtime;

21. The Company policy regarding equipment, tools and clothing issued to employees and the laundry for such clothing and the party responsible for the cost;

22. The method of determining a work week for payroll purposes. (The beginning and ending of a work week);

23. The number of layoffs and the number of bargaining unit employees affected by each layoff in 1994 and year to date in 1995;

Union and it would be unduly burdensome to compile it (Nos. 5 & 6); that many of the Union's information requests are overbroad to the extent they are not limited to bargaining unit employees (Nos. 7, 8, 9, 14, 15, 16, 29, and 31); that several of the information requests are vague (Nos. 3, 4, and 32) or seek information which is confidential (No. 31) or not presumptively relevant (No. 33); and that it is excused from providing the information requested because the Union's request is not designed to seek information necessary to bargain in good faith, but to harrass the Respondent. The Respondent asserts that it

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24. The current scheduled start times for all bargaining unit shifts and night premium pay qualification;

25. The Company policy regarding pay for Holiday work and Saturday and Sunday work or scheduled days off in lieu of Saturday or Sunday;

26. The current method for promotions to higher paying jobs, shift preference, vacation preference, layoffs and job transfers;

27. Total number of straight time hours worked by the bargaining unit in 1994 and year to date in 1995;

28. Updated seniority list;

29. Number of weeks vacation each employee is eligible to receive year to date;

30. OSHA 200 logs;

31. Individual copies of employees disciplinary records;

32. Declaration of all past practices not covered in employee handbook or employee benefits booklets;

33. Annual income statements and balance sheets for the last three (3) fiscal years, beginning with the most current.

made known its foregoing objections to the Union in a supplemental response dated August 21, 1995, a copy of which is attached to the Respondent's response to the Notice to Show Cause, in which it stated that certain of the information would be provided, requested clarification with respect to certain of the information requests, and explained its objections to the information requests. In these circumstances, where there appear to be material issues of fact as to whether the Respondent has unlawfully refused to provide the Union with some or all of the information requested, we shall deny the General Counsel's Motion for Summary Judgment with respect to the information allegations, and remand those allegations for further appropriate action.[2]

On the entire record, the Board makes the following

Findings of Fact

I. JURISDICTION

At all material times the Respondent, a New Jersey corporation with an office and place of business in Sulphur Springs, Texas, has been engaged in the business of producing and selling dairy products.

During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its business operations, purchased and received for use at its Sulphur Springs, Texas facility, goods valued in excess of $50,000 directly from suppliers located outside the State of Texas. We find that the Respondent is an employer engaged in

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[2] See *People Care, Inc.*, 314 NLRB 1188 (1994).

commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held March 8, 1995, the Union was certified on June 13, 1995, as the collective-bargaining representative of the employees in the following appropriate unit:

> INCLUDED: All production workers, maintenance, vault and warehouse employees employed by Borden, Inc., at its facility located at 500 N. Jackson St., Sulphur Springs, Texas.
>
> EXCLUDED: All supervisors, guards, office clerks, lab employees, and confidential employees as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

About June 16, 1995, by letter, the Union requested the Respondent to bargain,[3] and since June 27, 1995, the

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[3] Although the Respondent's answer denies that the Union requested bargaining by letter dated June 16, 1995, a copy of the Union's letter requesting information and dates to begin negotiations is attached to the General Counsel's Motion for Summary Judgment. We find that this letter constituted a request to bargain. See *Biewer Wisconsin Sawmill*, 306 NLRB 732 fn. 4 (1992).

Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

Conclusion of Law

By refusing on and after June 27, 1995, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir.1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir.1965).

ORDER

The National Labor Relations Board orders that the Respondent, Borden, Inc., Sulphur Springs, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with United Food and Commercial Workers International Union, AFL – CIO, CLC, Local 540, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> INCLUDED: All production workers, maintenance, vault and warehouse employees employed by Borden, Inc., at its facility located at 500 N. Jackson St., Sulphur Springs, Texas.
>
> EXCLUDED: All supervisors, guards, office clerks, lab employees, and confidential employees as defined in the Act.

(b) Post at its facility in Sulphur Springs, Texas, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 16 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the allegations in the complaint regarding the Respondent's refusal to provide information to the Union are remanded to the Regional Director for further appropriate action.

Dated, Washington, D.C.

September 12, 1995

William B. Gould IV	Chairman
Margaret A. Browning	Member
Charles I. Cohen	Member

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with United Food and Commercial Workers International Union, AFL – CIO, CLC, Local 540 as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

INCLUDED: All production workers, maintenance, vault and warehouse employees employed by Borden, Inc., at its facility located at 500 N. Jackson St., Sulphur Springs, Texas.

EXCLUDED: All supervisors, guards, office clerks, lab employees, and confidential employees as defined in the Act.

BORDEN, INC.

NOT INCLUDED IN BOUND VOLUMES

GBC
Sulphur Springs, TX

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

BORDEN, INC.

Employer

and

Case 16-RC-9768

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 540

Petitioner

DECISION AND CERTIFICATION OF REPRESENTATIVE

The National Labor Relations Board, by a three-member panel, has considered an objection to an election held March 8, 1995, and the hearing officer's report recommending disposition of it. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 28 for and 26 against the Petitioner, with 1 challenged ballot, a number insufficient to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, and has decided to adopt the hearing officer's findings[1] and recommendations, and finds that a certification of representative should be issued.

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[1] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for the United Food & Commercial Workers International Union, Local 540 and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> INCLUDED: All production workers, maintenance, vault and warehouse employees employed by Borden, Inc., at its facility located at 500 N. Jackson St., Sulphur Springs, Texas.
>
> EXCLUDED: All supervisors, guards, office clerks, lab employees, and confidential employees as defined in the Act.

Dated, Washington, D.C., June 13, 1995.

William B. Gould IV, Chairman

Margaret A. Browning, Member

Charles I. Cohen, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

The hearing officer erroneously found that the dimensions of the conference room where the election took place were 13 by 17 feet. The record indicates that the dimensions of this room are 17.3 by 34.4 feet. The hearing officer's error does not affect the validity of her conclusions.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

BORDEN, INC.

Employer

and Case No. 16-RC-9768

UNITED FOOD & COMMERCIAL
WORKERS INTERNATIONAL
UNION, LOCAL 540

Petitioner

HEARING OFFICER'S REPORT ON OBJECTIONS

Pursuant to a Stipulated Election Agreement approved by the Regional Director on January 25, 1995,[1] an election by secret ballot was conducted on March 8, among certain employees[2] of Borden Inc. at its Sulphur Springs, Texas facility to determine whether they desire to be represented for purposes of collective bargaining by

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[1] All dates herein refer to 1995.

[2] The appropriate collective bargaining unit is as follows:

INCLUDED: All production workers, maintenance, vault and warehouse employees employed by Borden, Inc., at its facility located at 500 N. Jackson St., Sulphur Springs, Texas.

EXCLUDED: All supervisors, guards, office clerks, lab employees, and confidential employees as defined in the Act.

United Food and Commercial Workers International Union, Local 540.

Upon conclusion of the election, the parties were served with a copy of the Tally of Ballots reflecting the election results as follows:

Approximate number of eligible voters ... 56
Number of void ballots 1
Number of votes cast for Petitioner 28
Number of votes cast against participating labor organization 26
Number of valid votes counted 54
Number of challenged ballots 1
Number of valid votes counted plus challenged ballots 55
Challenges are not sufficient in number to affect the results of the election. A majority of the valid votes counted plus challenged ballots has been cast for UFCW Local 540.

On March 15, the Employer timely filed an Objection to the conduct of the election, a copy of which was duly served upon the Petitioner. A true copy of said document is attached as Exhibit 1.

As a result of the Regional Director's Order Directing Hearing and Notice of Hearing, a hearing was held before the undersigned on March 30. All parties to the proceedings appeared, were represented by counsel or otherwise, and were afforded full opportunity to be heard, to examine and cross examine, and to introduce evidence bearing on the issues upon which the hearing was held. The parties were granted permission to file briefs with the Hearing Officer. Both parties timely filed briefs, which have been carefully considered.

In making my determinations, I am mindful that the objecting party has the ultimate burden of proof. *Sonicraft, Inc.*, 276 NLRB 407, 414 fn. 18 (1985); *Boston Insulated Wire & Cable Systems v. NLRB*, 703 F.2d 876, 880 (5th Cir. 1983). Upon the entire record in this case, including my careful consideration of the arguments made by the Employer and by the Petitioner, a reconciliation of conflicts in testimony, wherever necessary, and based upon my observations of the attitude and demeanor of the witnesses, I make the following findings of fact, conclusions and recommendations:

Findings of Fact

In summary, the Employer's Objection addresses the issue of whether the voting booth used afforded employees adequate privacy to ensure that employees could cast their ballots in secrecy. It is undisputed that on the day of the election, the Board agent arrived without a voting booth and the Employer thereafter constructed a voting booth area with the materials at hand. The undisputed testimony established that the actual voting booth that was constructed, consisted of a piece of cardbord resting on some chairs, abutting the wall near a corner of the room. This resulted in a voting booth that was closed on three sides and opened on one side where voters were to enter to mark their ballots. It is undisputed that the cardboard partition was at least five feet high. It is also undisputed that in this voting booth area, a table with wheels was placed so that voters could mark their ballots. There is some dispute concerning how long the cardboard petition was and the exact location and the dimensions of

the table within the voting booth. The whole voting process took place in a 13 by 17 foot conference room.

The Employer contends that the table within the cardboard partition took up the entire voting booth area and this caused employees to vote without complete secrecy. An Employer witness, plant manager Edward Starkey, testified that he believed that when the table was placed within the voting booth area it filled up the entire voting booth. However, he also testified that he could not be certain of this and he never really inspected the voting booth up close. Contrary to Starkey, Employer witnesses, Larry Keller and Jeff Carpenter, testified that the table was placed at least one foot within the cardboard partition area.[3] They also testified that a voter could not walk around the table to vote because the table filled up the width of booth area. Three of the Employer's witnesses, Keller, Carpenter, and Anthony Moseley testified that the observer table was at least 8 feet away from the voting booth with the observers seated behind the table facing the opening of the voting booth.[4] Keller, who was the Employer observer for the afternoon session testified that employees waiting in line to vote all stood by the observer table until the voting booth was empty and from this location would be able to see into the opening of the voting booth. Keller also testified that he did not say anything to the Board agent about the voting booth being inadequate.

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[3] Larry Keller was the Employer's observer for the afternoon session as well as a voter. Jeff Carpenter was a voter.

[4] Anthony Mosely was a voter.

However, according to Union witnesses, Union Representatives Paul Cloer and Roy Rogers, there was enough room between the table and the cardboard partition to allow voters to walk around the table to ensure the privacy of marking the ballot. Paul Cloer testified that at the pre-election conference he was concerned about the privacy that the makeshift booth allowed. Because of this concern he specifically inspected the voting booth by walking inside the booth. Once inside the voting booth, Cloer testified that he actually verified by trial that employees could easily walk around the table to mark their ballots.[5] Also because of this concern, Cloer requested that the observer table be moved an additional six feet away from the opening of the voting booth and this request was complied with.

There was no evidence presented that any individual could see how any other employee marked their ballot. Keller, Mosely and Carpenter all testified that they did not see how any employee voted.[6]

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[5] Although it is not critical to the final decision, I credit Cloer that employees could walk around the table to vote. Cloer testified that he was concerned about the issue of privacy of voters at the pre-election conference and as a result of this concern he actually walked in and inspected the voting booth. Whereas Starkey admittedly never inspected the booth carefully and Keller and Carpenter were only in the booth for a very short time when they voted. I therefore find it believable that Cloer did in fact walk around the table in the voting booth to assure himself that voters could likewise do so.

[6] Mosely said that he could only see the back and arms of the person standing in the booth and Carpenter said that he could see the whole person in the booth but admitted that he didn't believe that he could see the ballot.

The Board has no requirement that the voting booth be completely enclosed. In *Bekins Moving & Storage Co.*, 279 NLRB 823 (1986) where some voters marked their ballots in a "three sided box" placed on a stack of cartons some 12 to 15 feet away from other individuals waiting to vote, and some voters didn't even bother to use the "three-sided box" to mark their ballots, the Board concluded that without something more, there was no evidence to suggest or even conclude that the ballots were not cast in secret. Likewise, in *Fotomat Corporation v. N.L.R.B.*, 634 F.2d 320 (C.A. 6, 1980), 105 LRRM 3138, 3141, voters marked their ballots in a three-sided box and this also was not found sufficient to overturn the results of the election.

Recommendation

I find no merit to the Employer's Objection. Based on the testimony concerning the physical layout of the voting booth, the location of the observer table and the complete absence of any testimony by any individual that they were able to see how voters marked their ballots, I recommend that the Objection be overruled and that a Certification of Representation be issued.

/s/ Elizabeth Gemperline

Elizabeth A. Gemperline, Hearing Officer
National Labor Relations Board,
First Region
Thomas P. O'Neill, Jr. Federal Building
10 Causeway Street, Sixth Floor
Boston, MA 02222-1072

Dated at Boston, Massachusetts
this 27th day of April, 1995[7]

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[7] Any party may, within fourteen (14) days from the date of issuance of this Report, file with the Board in Washington, D.C. an original and seven (7) copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the Regional Director of Region 16. If no exceptions are filed, the Board will adopt the Hearing Officer's recommendation. For a full description of post-hearing procedures, see Section 102.69 of the Board's Rules and Regulations.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60079

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

BORDEN, INC

Respondent

Petition for Review of an Order of the
National Labor Relations Board

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 8/1/96, 5 Cir., ___, ___ F.3d ___)

(AUGUST 27, 1996)

Before SMITH, DUHÉ and BARKSDALE, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FRAP

and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having noted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Illegible
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.